LIBRARY
SUPREME COURT, U.S.

JOHN T. FEY, Clerk

No. ~~356~~ 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

W. J. QUINN,
EDWIN R. ECKERSALL,
888 Union Station,
Chicago 6, Illinois,
Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellant.

T. H. MAGUIRE,
R. K. MERRILL,
Of Counsel.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of the Case	4
The Questions are Substantial	9
Conclusion	13

APPENDICES

Appendix A—Opinion below	14
Appendix B—Decree below	25
Appendix C—Report of Interstate Commerce Commission dated November 21, 1955 in Docket No. 31742, Chicago Intrastate Suburban Fares of Milwaukee Railroad	27
Appendix D—Order of Interstate Commerce Commission dated November 21, 1955	41
Appendix E—Order of Interstate Commerce Commission dated March 2, 1956	43
Appendix F—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. 1, et seq.	45

CASES CITED.

King v. United States, 344 U. S. 254	11
Radio Corporation of America v. United States, 341 U. S. 412	2
State of Florida v. United States, 282 U. S. 194	9

PAGE

State of Illinois v. United States, 101 F. Supp. 36, 342 U. S. 930 9

State of New York v. United States, 98 F. Supp. 855, 342 U. S. 882 11

State of North Carolina v. United States, 128 F. Supp. 718, 350 U. S. 805 9

Thompson v. United States, 343 U. S. 549 2

United States v. Great Northern R. Co., 343 U. S. 562 2

United States v. Pennsylvania Railroad Company, 323 U. S. 612 2

STATUTES CITED.

Interstate Commerce Act, as amended, 49 U. S. C. 1, et seq.:

National Transportation Policy 2

Section 13(3) 2; 3, 5, 8

Section 13(4) 2, 3, 5, 7, 8

Section 15a(2) 2

United States Code, Title 28:

Section 1253 2

Section 1336 2

Section 2101(b) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company submits herewith jurisdictional statement showing that this Court has jurisdiction on appeal from the decree entered by the District Court for the Northern District of Illinois, Eastern Division, on June 14, 1956, and that substantial questions are presented by the appeal.

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is not yet

reported. It is set forth in Appendix A, *infra*, pp. 14-24. The report of the Interstate Commerce Commission is reported at 297 I.C.C. 353. It is set forth in Appendix C, *infra*, pp. 27-40.

JURISDICTION.

This action was brought under 28 U. S. C., Section 1336 by the State of Illinois, Illinois Commerce Commission, and Milwaukee Road Commuters' Association to set aside two orders of the Interstate Commerce Commission (Appendices D and E, *infra*, pp. 41-42). The decree sought to be reviewed (Appendix B, *infra*; pp. 25-26) is dated and was entered June 14, 1956. Notice of appeal was filed June 15, 1956, in the District Court of the United States for the Northern District of Illinois, Eastern Division. Jurisdiction of this Court is conferred by 28 U. S. C., Sections 1253 and 2101(b). The following cases sustain the jurisdiction of this Court to review the decree on direct appeal: *United States* v. *Pennsylvania Railroad Company*, 323 U. S. 612; *Radio Corporation of America* v. *United States*, 341 U. S. 412; *Thompson* v. *United States*, 343 U. S. 549; *United States* v. *Great Northern R. Co.*, 343 U. S. 562.

STATUTES INVOLVED.

This appeal involves the following provisions of the Interstate Commerce Act, as amended, set forth in Appendix F, *infra*, pp. 45-47: National Transportation Policy (preceding Section 1) and Sections 13(3), 13(4) and 15a(2), 41 Stat. 484, 48 Stat. 220, and 54 Stat. 899 and 912, 49 U. S. C. Sections 13(3), 13(4), and 15a(2).

QUESTIONS PRESENTED.

1. The question of most serious public concern presented by this appeal is whether a state commission must first sit in judgment on the lawfulness of intrastate rates or fares before the Interstate Commerce Commission can exercise

its powers under Section 13(3) and (4) of the Interstate Commerce Act. This Court has clearly held that prior state action is not required.

The lower court held to the contrary.

Also presented by this appeal are the following questions:

2. Whether the court below erred in holding that the Interstate Commerce Commission cannot fix the interstate and intrastate suburban fares of Chicago, Milwaukee, St. Paul and Pacific Railroad Company on the same basis as the suburban fares of the Chicago and North Western Railway Company in the absence of evidence of comparability in operation of the two railroads.

3. Whether the court erred in holding that the Interstate Commerce Commission's said report and orders, which fixed both interstate and intrastate fares, should be set aside because of the absence of a specific finding of what contribution from the intrastate traffic would constitute a fair proportion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company's total income, or, in the alternative, a finding that the revenue produced by the intrastate fares proposed by the Interstate Commerce Commission will constitute not more than a fair proportion of Chicago, Milwaukee, St. Paul and Pacific Railroad Company's total income.

4. Whether the court erred in holding that the Interstate Commerce Commission's finding that the prescribed fares

> * * * are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service"

does not supply any need for findings of the nature referred to in paragraph 3, *supra*.

5. Whether the court erred in holding that the evidence does not support the Interstate Commerce Commission's finding that the prescribed fares are just and reasonable.

6. Whether the court erred in holding that the order of the Interstate Commerce Commission, dated March 2, 1956, prescribing intrastate fares, and the prior report and order dated November 21, 1955, prescribing interstate fares, are beyond the power, and are an abuse of authority, of the Interstate Commerce Commission.

7. Whether the court erred in holding that said report and orders are not supported by the findings of, nor by, the evidence before the Interstate Commerce Commission in said proceeding.

STATEMENT OF THE CASE.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "the Milwaukee") operates a railroad in and through thirteen states of the Middlewest and the Pacific Northwest, having eastern termini at Chicago, Illinois, and Westport, Indiana, and western termini at Seattle and Tacoma, Washington. Among its services is the transportation of passengers in the Chicago suburban area between Chicago, on the one hand, and Walworth, Wisconsin, to the north and Elgin, Illinois, to the west, including numerous intermediate points within the State of Illinois.

Faced with annual out-of-pocket losses[1] from its suburban operations of over $1,000,000, the Milwaukee in July,

[1] "Out-of-pocket loss" refers to the deficit remaining after deducting suburban passenger revenues from out-of-pocket expenses incurred in performing the suburban service. "Out of-pocket expenses" of suburban service are those expenses which, over a period of time, would be avoided if the suburban service were not performed.

1952, filed a petition with the Illinois Commerce Commission requesting permission to discontinue its lightly patronized non-rush hour trains. It also requested permission to increase its Illinois intrastate suburban fares to a level that, together with the savings from such discontinuances as the Illinois Commerce Commission might authorize, would eliminate the out-of-pocket loss. After prolonged hearings, and a delayed decision, the Illinois Commerce Commission in November, 1954, denied permission to the Milwaukee to discontinue any trains or to increase its fares.

The Milwaukee then turned to its remedy under federal law by petitioning the Interstate Commerce Commission to investigate under Section 13(3),(4) of the Interstate Commerce Act, Title 49 U. S. C., Sec. 13(3),(4), whether the suburban fares unjustly discriminated against interstate commerce, and to adjust the fares to remove such discrimination.

In hearings before the Interstate Commerce Commission (hereinafter called "the Commission") the Milwaukee offered detailed evidence of an annual out-of-pocket loss from its suburban passenger operations of slightly over $700,000, which reflected savings from dieselization of its motive power during 1954. The Commission, over objection that it had excluded certain substantial out-of-pocket expenses, found the annual out-of-pocket loss to be $306,038. Including fully distributed expenses,[2] the Milwaukee showed an additional annual suburban passenger loss, unquestioned by the Commission and uncontested by plaintiffs, of approximately $1,100,000.

---

[2] "Fully distributed expenses" include the out-of-pocket expenses (see note [1]), plus a fair allocation of expenses incurred jointly by the suburban passenger service and other services.

In addition, detailed evidence was offered of the extensive facilities, equipment and personnel required for the suburban passenger service, the unfavorable transportation characteristics of the traffic involved,[3] and the suburban fares of other railroads and bus companies in the Chicago area.

The Commission, by order dated November 21, 1955, with respect to interstate fares, and by order dated March 2, 1956, with respect to intrastate Illinois fares, prescribed increases averaging approximately 21%. The increased interstate fares became effective January 29, 1956, and the intrastate Illinois fares on April 20, 1956. The same fare level had already been in effect since 1953 on the Chicago and North Western Railway, which, like the Milwaukee, serves the suburban area north and west of Chicago in Illinois and Wisconsin.

The Commission found that the increased fares would produce additional annual revenue of approximately $383,000, which would eliminate the $306,038 out-of-pocket deficit as found by the Commission and contribute approximately $77,000 to indirect costs and taxes. Stated differently, the $77,000 would defray 7% of the additional $1,100,000 of fully distributed expenses attributable to suburban service.

In support of its orders prescribing the increased fares, the Commission in its report of November 21, 1955, made the following ultimate findings:

"We find:

1. That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-

[3] The traffic consists principally of a mass movement of thousands of passengers to Chicago during the morning rush hours and their return during the evening rush hours, with a resulting high incidence of idle equipment and personnel.

pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.

2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13(4) of the Interstate Commerce Act.

3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

5. That respondent's interstate suburban fares on the same bases as herein prescribed for intrastate application will be just and reasonable for the future."

Suit was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, by the State of Illinois, Illinois Commerce Commission, and Milwaukee Road Commuters' Association to set aside the Commission's order. Motion by plaintiffs for a temporary restraining order was denied by the lower court on April 18, 1956, upon condition that the Milwaukee refund the excess fares collected on and after April 20, 1956, if the Commission's order should not be sustained.

By decree dated June 14, 1956, the District Court adjudged that:

(1) The Commission's order of November 21, 1955, prescribing interstate suburban fares, its report of November 21, 1955, and its order of March 2, 1956, prescribing intrastate Illinois suburban fares, are beyond the Commission's power and an abuse of its authority;

(2) Said report and order are not supported by the findings of, nor the evidence before, the Commission;

(3) Said report and orders of the Commission are void and are set aside, and the subject matter remanded to the Commission for further proceedings not inconsistent with the court's opinion;

(4) The Commission is permanently enjoined from enforcing its report and orders, and the Milwaukee from complying therewith; and

(5) The Milwaukee shall return all monies received by it as excess fares under the court's order of April 18, 1956, aforesaid.

The court's opinion found the Commission's orders unlawful because:

(1) The Commission made no finding as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the Milwaukee's total income or, in the alternative, a finding that the revenue produced by the intrastate suburban fares proposed by it will constitute not more than a fair proportion of the Milwaukee's total income;

(2) The evidence before the Commission did not support the finding that the prescribed fares are just and reasonable; and

(3) The state commission must, before the Interstate Commerce Commission can exercise the authority conferred upon it by Section 13(3),(4) of the Interstate Commerce Act, first be given an opportunity to fix fares on the same evidence and on the same basis.

The Milwaukee on June 15, 1956, filed its Notice of Appeal with the lower court.

On June 18, 1956, the court by order stayed the injunction prescribed by its decree of June 14, 1956, upon like conditions for impounding and refunding of excess fares as prescribed in the court's order of April 18, 1956.

THE QUESTIONS ARE SUBSTANTIAL.

The questions herein presented are of far-reaching consequence, both to the orderly regulation of interstate commerce by the Interstate Commerce Commission and to the regulated carriers.

1. Of foremost concern is the invalidation of a Commission order because of alleged failure of the carrier first to seek relief from the state commission. This action by the lower court is contrary to the holding in *State of Florida* v. *United States*, 282 U. S. 194, 210:

> "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the state itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority."

It is absolutely vital that the Interstate Commerce Commission in discharging the duties imposed upon it by Congress be not delayed by proceedings before state bodies whose jurisdiction is limited to interpreting and applying state statutes. *State of North Carolina* v. *United States*, 128 F. Supp. 718, 724, aff'd. 350 U. S. 805; *State of Illinois* v. *United States*, 101 F. Supp. 36, 47, aff'd. 342 U. S. 930.

The court further disregards the undisputed evidence before the Interstate Commerce Commission that the Milwaukee did, in fact, seek relief from the Illinois Commerce Commission, and notwithstanding its showing of an annual out-of-pocket loss at the time of the hearings of over $1,000,000, the state commission, more than two years and three months after the Milwaukee appealed to it for relief, refused any increase in fares. After such treatment from the state commission, the district court's ruling that the Milwaukee must first seek relief from its presently claimed out-of-pocket deficit of slightly over $700,000 from the same state commission that had just previously withheld relief from an annual out-of-pocket loss of over $1,000,000, is arbitrary in the extreme.

2. Also of great concern to all carriers, as well as to the Commission, is whether the Commission can prescribe the same fares for one railroad as in effect on another, without evidence of comparable operating conditions on each. A standard commonly used in determining maximum reasonable rates and fares is their comparison with rates and fares on like traffic in the same or similar territory. Here, the Commission used as a guide the suburban fares in effect since 1953 on the Chicago and North Western Railway, which, like the Milwaukee, serves the suburban territory north and west of Chicago. The actual effect of the comparison was not to show a need for increased fares to remove discrimination against interstate commerce, which had already been clearly established by the Milwaukee's own cost figures, but to hold down the Milwaukee's fares to a level which does not meet the full cost of the suburban service, nor make any return on investment.

The lower court's decision would make virtually impossible the prescription by the Commission or establishment

by the carriers of uniform fares or rates on like traffic between the same points or in similar territory, because of the impossibility of showing the same operating conditions for any two carriers, and could seriously disrupt the passenger and freight rate structures of the entire country.

3. Another question of substance is the lower court's insistence on a finding by the Commission of what contribution from intrastate traffic would constitute a fair proportion of the Milwaukee's total income. The Interstate Commerce Act requires no such finding, and this Court has specifically declared one unnecessary in *King* v. *United States*, 344 U.S. 254, 274, 275.

The district court attempts to differentiate the *King* case by the finding therein that the revenue from the proposed rates would constitute not more than a fair proportion of the railroad's total income. In the present case the Commission found:

> "That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service."

As stated in *State of New York* v. *United States*, 98 F. Supp. 855, 859, aff'd. 342 U.S. 882, regarding a contention of inadequacy of like findings supporting a Commission order increasing intrastate suburban fares:

> "Experience indicates that to exert pressure for such strivings toward perfection usually results in a piling on of more words without essential change in

substance. The criticism loses its force when the report is read as a whole. It shows without doubt what the Commission thought and did, and thereby the real function of findings is served."

4. The lower court's conclusion that the evidence fails to support the Commission's finding that the prescribed fares are just and reasonable is based on the mistaken premise that the only supporting evidence was of like suburban fares on the Chicago and North Western Railway.

Reference has previously been made to the detailed evidence presented by the Milwaukee of the high cost of the suburban operation, the unfavorable transportation characteristics of the traffic, and fares of other railroads and bus companies in the Chicago area. For the lower court to ignore such substantial evidence directly bearing on a reasonable fare level, and then declare the evidence insufficient to support a finding of reasonableness, is to substitute its uninformed judgment for that of an expert body, the Interstate Commerce Commission.

5. Another substantial question presented is whether a court can strike down an order of the Commission fixing interstate suburban fares, over which it has plenary jurisdiction, together with an order fixing intrastate suburban fares, on any of the grounds above discussed. On the premise that such action was unintentional, the United States of America and the Interstate Commerce Commission attempted by motion to have the lower court correct its order to eliminate from its scope the interstate fares. The lower court, however, denied said motion, and its decree remains an improper interference with the Commission's regulation of interstate commerce.

CONCLUSION.

The questions presented by this appeal are so substantial and of such serious import to the Interstate Commerce Commission and all the carriers subject to its jurisdiction, as to require plenary consideration, with briefs on the merits and oral argument for their resolution, and probable jurisdiction should be noted.

Respectfully submitted,

W. J. Quinn,
Edwin R. Eckersall,
Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

T. H. Maguire,
R. K. Merrill,
Of Counsel.

888 Union Station
Chicago 6, Illinois

August 10, 1956

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

STATE OF ILLINOIS; ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Plaintiffs,* v. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Defendants.*	No. 56 C 681.

June 14, 1956.

Before ELMER J. SCHNACKENBERG, Judge of the United States Court of Appeals for the Seventh Circuit, and PHILIP L. SULLIVAN and WALTER J. LABUY, District Judges.

SCHNACKENBERG, *Circuit Judge.* This is an action to set aside and enjoin the enforcement of an order[1] of the Interstate Commerce Commission[2] authorizing the Chicago, Milwaukee, St. Paul and Pacific Railroad Company[3] to put into effect intrastate rates or fares for Chicago area suburban service higher than those authorized by the Illinois Commerce Commission.[4]

---

[1] Entered March 2, 1956, based on report dated November 21, 1955, (297 I. C. C. 353).

[2] Herein sometimes referred to as the "interstate commission".

[3] Herein sometimes refered to as the "Milwaukee Road".

[4] Herein sometimes referred to as the "state commission."

The Milwaukee Road by petition to the interstate commission requested an investigation under § 13 (4) of the Interstate Commerce act[5] to determine whether intrastate suburban passenger rates approved by the state commission unjustly discriminated against interstate commerce. It asked that, if found so to discriminate, the rates be adjusted so as to remove the discrimination. The order of the interstate commission which we now consider is based upon its report of November 21, 1955, in which it refers to the Milwaukee Road as "respondent" and Milwaukee Road Commuters Association as "protestant".

This report states that "on an out-of-pocket basis respondent shows a deficit of $724,511, while protestant shows an income of $9,701. For expenses other than the Union Station, protestant's lower figures are accounted for by the elimination of any allowance for depreciation and of certain accounts for maintenance of way not included in respondent's study before the Illinois commission." The report quotes the dollar amounts of depreciation which the interstate commission considers proper direct charges to the service and hence are out-of-pocket costs. It similarly considers certain maintenance of way expenses. The report points out that these depreciation and maintenance of way charges were not included in respondent's showing before the Illinois commission, but were included in its showing before the interstate commission. The report states that respondent's explanation for the prior omission was "its impression that, even without them, it had shown a considerable deficit from this

[5] 49 U.S.C.A., § 13 (4). "Whenever * * * the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes * * * any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

service." The report adds: "This explains but does not excuse its incomplete showing before the Illinois commission."

The report finds:

> "Summarizing, the total revenues from the passenger-carrying portion of the suburban service were $1,799,140, the out-of-pocket cost, not including nonpayroll taxes or return, was $2,269,404, and the credit for nonrevenue passengers $164,226, resulting in a total out-of-pocket deficit of $306,038.
>
> If the fares were increased an average of 20 percent as in *Commutation and Multiple Fares, Illinois and Wisconsin,*[6] *"supra,* plus the additional increase to a minimum of 25 cents per trip, the increased revenue based on the 1954 movement would be about $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000 annually."

The report also sets forth as follows:

> "Protestant shows that the proposed fares are somewhat higher than certain of the fares of the dieselized lines of the Burlington and the Chicago, Rock Island and Pacific Railroad Company in the Chicago area, while respondent shows that they are somewhat lower than certain fares which the commissions have approved for the electric lines of the Illinois Central Railroad Company and the Chicago South Shore and South Bend Railroad in the Chicago area. However, we think that the comparison with the fares of the North Western is more persuasive, as, in the words of respondent's traffic witness, there is 'a strong similarity' between the suburban territory served by it and that served by the North Western, the two sets of fares, as approved by this and the Illinois commission, having formerly been on a parity."

---

[6] 288 I. C. C. 15.

Referring to the net railway operating income of respondent in 1954, the report states that it earned "from its freight operations $37,393,050, and suffered a deficit from its passenger operations of $22,824,532, resulting in a net railway operating income of $14,568,518. To the extent that this suburban service fails to meet the out-of-pocket cost and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, State and interstate."

The report also makes the following findings:

"1. That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.

2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act.

3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

5. That respondent's interstate suburban fares on the same bases as herein prescribed for intrastate application will be just and reasonable for the future."

1. While the interstate commission finds that the intrastate rates which it approves "would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000 annually" and that those fares "will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment," at no place does the commission make any findings as to what contribution from the intrastate suburban traffic would constitute a fair proportion of the railroad's total income. In fact the interstate commission makes no finding as to what the Milwaukee Road's total income was for the year in question, and likewise no finding as to what would be a fair proportionate share of total income of the road which the intrastate traffic now under consideration should contribute. These data are not found by the interstate commission either as specific findings in dollars or in any other form. Nor does the commission find that the revenue produced by the intrastate rates proposed by it will constitute not more than a fair proportion of respondent's total income, which finding was held sufficient in *King* v. *United States*, 344 U.S. 254, at 275.

In *North Carolina* v. *United States*, 325 U.S. 507, at 516, the court said:

> "But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intrastate passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income."

The report which we are considering asserts that intrastate traffic should make a larger contribution, but there is

no finding as to what contribution would be a fair proportion of the railroad's total income.

The rule is established that the interstate commission must make basic findings required to support its order. *Florida* v. *United States*, 282 U.S. 194, at 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U.S. 74, at 86.

An order of the interstate commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U.S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454, at 462; *United States* v. *Chicago, M., St. Paul & P. R. Co.*, 294 U.S. 499, at 504.

In *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U.S. 74, at 86, the court said:

> "The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

See also 15 C. J. S. 534.

The report of the interstate commission completely ignores that, in determining intrastate fares, a controlling inquiry is what contribution from the intrastate traffic would constitute a fair proportion of the railroad's income. In the case at bar it is not sufficient that the interstate commission found that the prescribed rates will "make a fair contribution toward respondent's indirect costs and return on investment". A fair proportion of a carrier's total income is not the same as a contribution to indirect costs and return on investment. Paying all of the costs of suburban service and, in addition, making a contribution

to the other costs of the railroad, may well be more than contributing a fair proportion of Milwaukee Road's total income. Nor is it sufficient that the interstate commission found that, to the extent that the suburban service "fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs", it discriminates against its freight operations. This finding is no substitute for one as to what it should contribute as a fair proportionate share of the railroad's total income. Without the latter finding the order of the interstate commission cannot stand. This is not inconsistent with *State of Illinois* v. *United States*, 101 F. Supp. 36, affirmed 342 U.S. 930. There was in that case a specific subsidiary finding [281 I. C. C. 552].

> "The fares approved herein will yield a return after taxes of about 3.2 percent, and an average increase of about 20 percent or $1,300,000 per annum, which *we find to be the approximate measure of the revenue discrimination* against interstate commerce resulting from petitioner's present multiple and commutation fares." (Emphasis added.)

In that case the commission also found "That in connection with its minimum and round-trip suburban fares, petitioner has not shown any person-locality or *revenue discrimination against interstate commerce*." (Finding 2, 281 I. C. C. 552.) (Emphasis added.)

2. Even under the rationale of the interstate commission, it is somewhat difficult to ascertain from its report the precise obligation of the suburban service to which the intrastate fares, as fixed thereby, are to contribute after meeting the out-of-pocket deficit.

The report at one place says that if the fares were increased an average of 20 per cent,* plus an additional increase to a minimum of 25 cents per trip, the increased revenue based on the year 1954 would eliminate the out-of-

---

* Actually they were increased about 21 per cent according to the counsel for the Milwaukee Road, or 28 per cent according to counsel for the protestants.

pocket deficit and result in *a contribution to indirect costs and taxes*, of approximately $77,000 annually. Based upon the same year, the report at another place says that to the extent that this service fails to meet the out-of-pocket cost and make *all the contribution that it reasonably can to respondent's indirect costs*, it increases the latter's passenger deficit and results in an undue burden on its freight operations. In finding 4 the report states that the prescribed fares are necessary so that the travel thereunder may make a *fair contribution toward respondent's indirect costs and return on investment*. If a *contribution* is to be made toward the satisfaction of an obligation, it is obvious that the extent of the obligation must be fixed; otherwise no one can know what the size of the contribution should be. We are here speaking of an involuntary contribution. The limitless requirements implicit in the parts just cited from the report are reminiscent of public fund raising campaigns which used as their slogan "Give till it hurts". That was a legitimate civic or patriotic appeal. However, we are here confronted with the imposition of an involuntary contribution being exacted by legal means. To be sustained, it must be based upon a finding of the extent of the obligation. It cannot be supported by a vague reference to an unascertained amount of "indirect costs and taxes" or what the suburban service can reasonably contribute to the Milwaukee Road's "indirect costs", or "a fair contribution toward respondent's indirect costs and return on investment".

3. We are confronted with the question of whether the evidence before the interstate commission supports its finding that the intrastate fares which it has prescribed will be just and reasonable for the future. This finding rests on an averment in the report that the comparison with the fares of the Chicago and North Western Railway Company is more persuasive, as, in the words of respondent's traffic witness, "there is a strong similarity between the suburban territory served by the Milwaukee Road and that served by the North Western, * * *".

The evidence of J. K. Pain, the traffic witnesses referred to, does not support this averment. He actually said that he believed there is a *difference* in the operation of the two roads and that he was not prepared on the subject of cost or expense, which was a little bit out of his line. He added that an endeavor was made to figure an increase on an equitable basis "that would recover our losses * * * and would be fair to the suburban passenger". When asked if Milwaukee Road's territory was "pretty similar" to North Western's, Mr. Pain asked, "Do you mean geographically or in operation or what?" When the examiner said that he was talking about the nature of the suburban community, the witness answered "Yes, you could probably say there is a strong similarity." Thereupon the attorney for the Milwaukee Road stated "we do not offer these North Western fares as a criteria (*sic*) as to what our fares should be".

There was no evidence offered showing similarity of equipment, service or operating conditions. On the other hand, the record shows that the lines are not comparable. The suburban North Western rates are based upon an operation of 72 steam locomotives and only 3 diesel locomotives as against a complete diesel operation on the Milwaukee. A comparison of the cost of the Milwaukee suburban operation under steam and diesel locomotives shows that the diesel operation costs less than steam. That a comparison cannot be properly made between a steam operation and a diesel operation has been recognized by the interstate commission in a case in which North Western Chicago suburban fares were raised to their present level, and the commission stated, in referring to the analysis upon which its order was based, "The above analysis relates to an existing suburban operation for the year 1951 and obviously does not contemplate the cost of some other suburban operation such as might be encountered with diesel engines, gallery-type cars and Budd cars."[8] Moreover, the interstate commission has taken note of the fact that the Milwaukee division of the North Western carries no freight whatsoever and that the entire cost there must be borne by passenger traffic. *Commutation Fares between Chicago and Wisconsin*, 279 I. C. C. 773, 777-778.

---

[8] 288 I. C. C. 15, at 23.

The Milwaukee suburban operation is alleged to be much more comparable to the suburban operation of the Burlington and Rock Island than it is to the North Western operation. Those are the other two Chicago railroads using diesel locomotives in their suburban service. The commission, nevertheless, ignores that comparison, and holds, in effect, that the Illinois commission was wrong in giving weight to it. Instead, the proposed report applies the North Western formula without any evidence in the record of similarity of conditions necessary to make that formula applicable. The use of the North Western formula was not justified. Without sufficient evidence of comparability in operation, there is no ground for fixing the Milwaukee Road's fares at the North Western level, or for finding that the resulting fares are just and reasonable.

We hold that the evidence does not support the findings of the interstate commission that the prescribed rates are just and reasonable. Nor can a carrier justify unreasonably high rates on intrastate business on the ground that only in that way is it able to meet losses on its interstate business. *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, at 483; *Smyth* v. *Ames*, 169 U.S. 466 at 541, 42 L. Ed., 819 at 847.

4. In the state commission proceeding, which was initiated by the Milwaukee Road, the latter showed in its exhibits that the depreciation of locomotives and coaches was not included in the out-of-pocket cost. Likewise, in its exhibits in that case it did not include in out-of-pocket expense certain maintenance of way accounts involving maintenance of facilities, such as roadbed, etc. The comments in the interstate commission's report, in regard to these items, show that they were by the Milwaukee Road deliberately removed from the consideration of the state commission. It follows that facts presented by Milwaukee Road to and relied upon by the interstate commission to support its finding as to an out-of-pocket suburban deficit, were not presented to nor relied on by the Milwaukee Road in the state commission proceeding. If different evidence is to be offered or a different basis of fares is to be urged before

the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis.

In *North Carolina* v. *United States*, 325 U.S. 507, at 511, the court said:

> "Since the enactment of § 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate."

Where a railroad seeks the fixing of higher intrastate rates by the interstate commission after failing in such endeavor before a state commission, § 13 (4) does not contemplate that the state commission is to be considered only a way station in a journey to the interstate commission. In the instant case justification for the exercise of the federal power to nullify state rates does not clearly appear from the record before us.

Plaintiffs have made various other charges against the order of the interstate commission, which we do not find it necessary to decide, in view of the fact that our views herein expressed sufficiently decide the case now before us.

In this type of case we are not required, under rule 52(a), Federal Rules of Civil Procedure, or otherwise, to make findings of fact: *Despatch Shops* v. *Railroad Retirement Board*, 60 F. Supp. 106, affirmed 154 F. 2d 417; *In Re Chicago, M. St. P. & P. R. Co.*; *Abrams* v. *Scandrett*, 138 F. 2d 433.

For the reasons hereinbefore set forth, the order of the Interstate Commerce Commission is set aside and the subject matter thereof is remanded to that commission for further proceedings not inconsistent herewith. A permanent injunction will issue forthwith, as prayed.

APPENDIX B.

UNITED STATES OF AMERICA

DISTRICT COURT OF UNITED STATES
Northern District of Illinois
Eastern Division

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION, *Plaintiffs,* v. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Defendants.*	No. 56 C 681.

DECREE.

This case has been heard on the complaint; the answers of defendants thereto; the record before the Interstate Commerce Commission in the proceeding known as Docket No. 31742 of that commission, and the arguments of counsel for plaintiffs and defendants, and the court being fully advised in the premises, ORDERS, ADJUDGES and DECREES:

1. The order of the Interstate Commerce Commission, dated March 2, 1956 (and the prior report and order dated November 21, 1955, upon which the order of March 2, 1956 was based) entered in proceeding Docket No. 31742, are beyond the power, and are an abuse of authority, of the Interstate Commerce Commission.

2. Said report and orders are not supported by the findings of, nor by the evidence before, the Interstate

Commerce Commission in the proceeding, commission's Docket No. 31742, in which they were entered.

3. Said report and orders of the Interstate Commerce Commission are void, and are set aside, and the subject matter is remanded to said Commission for further proceedings not inconsistent with the opinion this day filed herein.

4. The Interstate Commerce Commission is permanently enjoined from enforcing said report and orders, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (herein called "the Milwaukee Road") is permanently enjoined from continuing to give effect to the fares prescribed therein.

5. The Milwaukee Road shall return forthwith to the persons from whom collected all monies received by it as excess fares under the order of this court dated April 18, 1956.

6. Judgment is entered in favor of Illinois Commerce Commission and Milwaukee Road Commuters' Association, and against the Milwaukee Road for costs.

(Sgd) ELMER J. SCHNACKENBERG
United States Circuit Judge

(Sgd) PHILIP L. SULLIVAN
United States District Judge

(Sgd) WALTER J. LA BUY
United States District Judge

Dated: June 14, 1956

APPENDIX C.

INTERSTATE COMMERCE COMMISSION.

No. 31742[1].

CHICAGO INTRASTATE SUBURBAN FARES OF MILWAUKEE RAILROAD.

Decided November 21, 1955.

Respondent's intrastate fares within its Chicago, Ill., suburban area found to result in revenue discrimination against interstate commerce. Just, reasonable, and nondiscriminatory interstate and intrastate fares within said area prescribed. Outstanding orders in Nos. 26550 and 11703 modified accordingly.

R. K. MERRILL for respondent.

H. R. BEGLEY and WILLIAM J. GIBBONS for Illinois Commerce Commission.

E. B. WILKINSON, J. E. HART, and FLOYD L. THOMAS for interveners.

S. ASHLEY GUTHRIE and FRANCIS D. FISHER for protestant.

[1] This report embraces also, on further hearing, No. 26550, **Passenger Fares and Surcharges**, 214 I. C. C. 174, and No. 11703, **Intrastate Rates Within Illinois**, 59 I. C. C. 350.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Exceptions were filed by the Illinois Commerce Commission and by the protestant to the report proposed by the examiner, and the respondent replied thereto. Exceptions and requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

This is an investigation, instituted upon petition of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, to determine whether its intrastate fares within its Chicago, Ill., suburban area, embracing points between and including Walworth, Wis., and Elgin, Ill., on the one hand, and Chicago Union Station, on the other, made or imposed by the Illinois Commerce Commission, cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce, and to determine what fares, if any, or what maximum or minimum fares, should be prescribed to remove any unlawfulness that may be found to exist. The investigation also includes the question of whether the outstanding orders in No. 26550, *Passenger Fares and Surcharges*, 214 I. C. C. 174, prescribing the maximum interstate one-way and round-trip fares in the above area, and in No. 11703, *Intrastate Rates Within Illinois*, 59 I. C. C. 350, prescribing the minimum intrastate one-way and round-trip fares in said area, as subsequently modified, including the modifications made in connection with *Increased Passenger Fares, Western Railroads*, 269 I. C. C. 281, and *Increased Coach Fares on Western Railroads*, 269 I. C. C. 632, should be further modified so as to permit the establishment and maintenance of the increased interstate and intrastate one-way and round-trip fares hereinafter described.

The Northern Indiana Coal Traffic Association, Wisconsin Paper and Pulp Manufacturers Traffic Association, and Wisconsin Canners Association, organizations of shippers

and receivers of freight in interstate and intrastate commerce over the lines of the respondent and other railroads, adduced evidence in its behalf. The Milwaukee Road Commuters Association, an association of commuters in its Chicago suburban area, hereinafter called protestant, adduced evidence in opposition.

Respondent's present interstate and intrastate coach fares as prescribed in the proceedings above cited between points in this area are made 2.5 cents per mile, minimum 15 cents, with round-trip fares made 180 percent of the one-way fares. Its present 10-trip fares are made 5 times the round-trip fares, 25-trip fares 11.5 times the round-trip fares, and commutation fares on the basis of the so-called old North Western basis, as approved for intrastate application in Illinois Commerce Commission Docket No. 38377, decided September 18, 1951, heard jointly with our No. 30765, *Illinois Intrastate Multiple Ride and Commutation Fares*, the latter proceeding having been discontinued on respondent's request, upon its establishment of interstate multiple-ride and commutation fares in this area on the same basis as had been approved by the Illinois Commission for intrastate application. The old North Western basis had been approved by this and the Illinois Commission for interstate and intrastate application between points in the Chicago suburban area of the Chicago and North Western Railway Company, called the North Western, in *Commutation Fares Between Chicago and Wisconsin*, 279 I. C. C. 773 (1950), and related State proceeding. In 1953, that basis was increased an average of about 20 percent, upon application of the North Western, in *Commutation and Multiple Fares, Illinois and Wisconsin*, 288 I. C. C. 15, and related Illinois proceeding.

Effective July 25, 1955, with the approval of this and the Illinois Commission, the North Western increased the minimum fare within its suburban area in connection with all types of tickets to 25 cents per trip. The two Commissions have cooperated in approving uniform fares for most of the other suburban lines serving the Chicago area. See *New York Central Commutation Fares, Chicago and Ind.*,

279 I. C. C. 188 (1950), *Minimum Passenger Fares, Chicago N. S. & M. Ry. Co.*, 279 I. C. C. 628 (1950), *Chicago S. S. & S. B. Fares*, 279 I. C. C. 663 (1950), *Increased Passenger Fares, Chicago, N. S. & M. Ry. Co.*, 284 I. C. C. 221 (1952), *Illinois Central Multiple Fares in Chicago Area*, 281 I. C. C. 537, 289 I. C. C. 133 (1953), *Fares, Chicago S. S. & S. B. R.*, 291 I. C. C. 665 (1954).

In 1952, however, the instant respondent, instead of filing petitions or schedules with both Commissions, so that like cooperative action could be taken, filed a petition with the Illinois Commission only, requesting—

> authority to discontinue all off-peak Chicago suburban passenger trains and consolidate certain peak-hour trains and also to increase one-way, round-trip and commutation fares to such extent as will after taking into consideration the economy effected by such discontinuances and consolidation of trains, give respondent sufficient revenues to permit operation of the Chicago suburban service without an out-of-pocket loss.

By order dated November 10, 1954, after extensive hearings, the Illinois Commission found, based on respondent's own showing, modified to reflect the change in its suburban operations from steam to diesel during the pendency of the proceeding, with certain adjustments with respect to the Union Station and credits for nonrevenue passengers, that respondent's suburban service was already being operated without an out-of-pocket loss and therefore denied its request in toto. Thereupon, respondent filed the petition with us as a result of which the instant proceeding was instituted.

Respondent now seeks a modification of the outstanding orders in Nos. 26550 and 11703, and a new section 13 order authorizing it to increase its interstate and intrastate fares within the Chicago suburban area as follows:

One-way fares to be increased from 2.5 cents per mile, minimum 15 cents, to 3.2 cents per mile, minimum 25 cents, and round-trip fares to be increased from 180 percent of the

present one-way fares to 180 percent of the proposed one-way fares, resulting in an average increase of 26.9 percent, or about $113,312 annually; 10-ride fares to be increased from 5 times the present round-trip fares to 5 times the proposed round-trip fares, reflecting an average increase of 27 percent, or about $27,525 annually; 25-ride fares to be increased from 11.5 times the present round-trip fares to 12.5 times the proposed round-trip fares, reflecting an average increase of 36.1 percent, or about $118,336 annually; and commutation fares to be increased 40 percent, subject to maxima of $1.60, $5.75, and $6.40, in connection with the weekly, 46-ride monthly, and unrestricted monthly commutation fares, respectively, resulting in an average increase of 27.4 percent, or about $258,913 annually.

The average increase in all fares in the suburban area would be 28.8 percent, or a total of about $518,086 annually, the annual-increase estimates being based on the 1954 volume. The one-way, round-trip, and 10-trip fares apply, and would continue to apply, between all points in the suburban area, while the 25-trip and commutation fares apply, and would continue to apply, between the Union Station, on the one hand, and other points in the suburban area, on the other. The only interstate fares in issue are those to and from Walworth and Zenda, Wis., which are the only points in the suburban area located outside of the State of Illinois. The present, proposed, and prescribed fares are set forth in table I of the appendix to this report.

Respondent and protestant presented comprehensive studies, based on the year 1954, of the cost of the service, which are summarized in table II of the appendix. Both studies have been adjusted to reflect the complete conversion of the suburban operations from steam to diesel which took place on September 1, 1954. It will be noted that on an out-of-pocket basis respondent shows a deficit of $724,511, while protestant shows an income of $9,701. For expenses other than the Union Station, protestant's lower figures are accounted for by the elimination of any allowance for depreciation and of certain accounts for maintenance of way not included in respondent's study before the Illinois Commission.

Respondent operates 18 diesels in this suburban service, acquired at various dates from 1946 to 1954, at an original cost of $4,166,572, with accrued depreciation of $932,041, and an annual depreciation charge of $155,162, at the approved rate of 4.9 percent. It operates 131 coaches in this service acquired at various dates from 1900 to 1929, at an original cost of $2,627,153, with accrued depreciation of $2,334,404, and an annual depreciation charge of $39,842, at approved rates of from 1.7 to 3.18 percent. Protestant apparently considers these and the other depreciation charges not to be out-of-pocket costs because they do not represent cash outlays, but they are proper direct charges to the service in which the equipment or other property is used, and hence are out-of-pocket costs just as much as cash outlays for wages or materials.

The same observation applies to the accounts under maintenance of way not included in respondent's showing before the Illinois Commission but included here. Respondent's explanation for the prior omission was its impression that even without them it had shown a considerable deficit from this service. This explains but does not excuse its incomplete showing before the Illinois Commission.

On this record, we can accept respondent's figure of $2,270,161, reduced 3.2 percent[2], or to $2,197,516, as the out-of-pocket cost of the passenger-carrying portion of the suburban service, excluding nonpayroll taxes, return on investment, and Union Station expenses.

This leads us to a discussion of the Union Station expenses. The Chicago Union Station Company is owned jointly by The Pennsylvania Railroad Company, The Chicago, Burlington and Quincy Railroad Company, called the Burlington, and the respondent, the former owning 50 percent and each of the others 25 percent. The railroads using the Union Station facilities are obligated under the terms of an agreement between the proprietary companies to pay the wheelage proportion of the operation of the station, the wheelage proportion being that portion which the

[2] Or by $72,645, the out-of-pocket cost of the head-end service, computed on a car-foot-mile basis.

number of each railroad's locomotives and cars using the station and facilities during each month bears to the total number of locomotives and cars of all the users, each locomotive to be counted as 2 cars and each suburban coach as 4/5 of a car. The Chicago and Alton Railroad Company (now the Gulf, Mobile and Ohio Railroad Company) was admitted to use of the Union Station by agreement of September 18, 1915. This contract, insofar as it is here applicable, requires the Gulf, Mobile & Ohio also to pay a wheelage proportion of the Union Station operating expenses, without, however, the benefit of the reduced car count on suburban cars.

Respondent's figure of $305,530 as the out-of-pocket cost of this service for the use of the Union Station is the so-called relievable cost; that is, the payment it would be relieved of under the contract if it did not have the suburban service. Protestant's figure of $44,325, on the other hand, is based on a study of respondent's portion of the expenses which would be saved if there was no suburban service at all into the station. This basis is the same as that originally presented by respondent before the Illinois Commission and approved in numerous prior proceedings, and we see no reason for not approving it here. However, here again, protestant has improperly deducted depreciation charges in the amount of $27,563, which if added to the figure of $44,325, results in a total of $71,888. We can accept this amount as the out-of-pocket cost of this service, not including nonpayroll taxes or return, for the use of the Union Station.

The remaining difference between the cost studies of respondent and protestant consists of the different adjustments made for nonrevenue passengers, specifically nonsuburban employees who travel to and from work under passes issued as a customary part of their compensation, respondent's figure being $17,928 and protestant's $173,265. Respondent's figure is based on its operating witness' estimate that the nontransportation of these nonsuburban employees would only save the use of two cars in each direction on its west line and one car in each direction on its

north line. Protestant's figure is based on its computation of the pro rata cost of transporting these nonsuburban employees based on data available of record. The ticket-selling and collection expense and liability for personal injuries is somewhat less in the case of pass than in the case of revenue passengers. Based on the method approved in the first report in *Illinois Central Multiple Fares in Chicago Area, supra*, at page 547, we find that the proper adjustment for this purpose is $164,226.

Summarizing, the total revenues from the passenger-carrying portion of the suburban service were $1,799,140, the out-of-pocket cost, not including nonpayroll taxes or return, was $2,269,464, and the credit for nonrevenue passengers $164,226, resulting in a total out-of-pocket deficit of $306,038.

If the fares were increased an average of 20 percent as in *Commutation and Multiple Fares, Illinois and Wisconsin, supra*, plus the additional increase to a minimum of 25 cents per trip, the increased revenue based on the 1954 movement would be about $383,000, which would eliminate the out-of-pocket deficit and result in a contribution to indirect costs and taxes, of approximately $77,000 annually.

Protestant shows that the proposed fares are somewhat higher than certain of the fares of the dieselized lines of the Burlington and the Chicago, Rock Island and Pacific Railroad Company in the Chicago area, while respondent shows that they are somewhat lower than certain fares which the Commissions have approved for the electric lines of the Illinois Central Railroad Company and the Chicago South Shore and South Bend Railroad in the Chicago area. However, we think that the comparison with the fares of the North Western is more persuasive, as in the words of respondent's traffic witness there is "a strong similarity" between the suburban territory served by it and that served by the North Western, the two sets of fares, as approved by this and the Illinois Commission, having formerly been on a parity.

Respondent shows that its suburban traffic has changed little in recent years and thus urges that the 1951 increase had no adverse effect on the movement of the traffic. It does not follow that the drastic increases now proposed, particularly for distances over 9 miles, would have no such adverse effect. There is no adequate support for the proposed increase in the 25-ride fares from 11.5 to 12.5 times the round-trip fares. We found that a similar increase proposed by the North Western, by discouraging travel, would not result in a substantial increase in revenue, and a like finding is warranted here.

According to the respondent, in 1954 railway costs were 149 percent, living costs 92 percent, and the average hourly earnings in manufacturing industries were 172 percent, higher than in 1940, as compared with the average increase made in its suburban fares in the same period of 69 percent, and 119 percent as proposed. However, compared with 1950, which was the basis of its cost study presented in No. 30765 and the related State proceeding, railway costs have increased 11.5 percent, living costs 4 percent, and hourly earnings 12.5 percent.

In 1954, in terms of net railway operating income, respondent earned from its freight operations $37,393,050, and suffered a deficit from its passenger operations of $22,824,532, resulting in a net railway operating income of $14,568,518. To the extent that this suburban service fails to meet the out-of-pocket costs and make all the contribution that it reasonably can to respondent's indirect costs, it increases respondent's passenger deficit and results in an undue burden upon its freight operations, state and interstate. This, of course, is the reason for the appearance of the freight shippers in this proceeding.

The one-way and round-trip fares here approved for respondent's suburban area, like those approved for the North Western and the Illinois Central, will be at a higher rate per mile than the corresponding fares to and from its non-suburban points. However, as we said of the North Western, this will be offset by the fact that

respondent's multiple and commutation fares for the longer hauls in the suburban area will be at a lower rate per mile than any of its non-suburban fares. Counsel for the Illinois Commission acknowledges that "perhaps the allowance of a minimum fare of 25 cents per trip and one-way fares based on approximately a 3-cent mile could be established to allow respondent 'similarity' with the North Western."

Protestant points out that the deficit from the respondent's total passenger operations is relatively greater than from its suburban operations; but as we said of a similar situation on the Illinois Central, the fact that respondent cannot make a profit or at least so far has been unable to make a profit on its other passenger-train service is no reason for depriving it of an opportunity to make a profit on its suburban operations if it can be done at lawful fares.

We find:

1. That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.

2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13(4) of the Interstate Commerce Act.

3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.

4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it,

under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

5. That respondent's interstate suburban fares on the same bases as herein prescribed for intrastate application will be just and reasonable for the future.

6. That the outstanding orders in Nos. 26550 and 11703 should be modified accordingly.

An appropriate order affecting the interstate fares will be entered, including appropriate modifications of the outstanding orders in the proceedings referred to. No affirmative order affecting the intrastate fares will be entered at this time; the respondent and the Illinois Commission are given a period of 60 days in which to adjust the intrastate fares on the bases prescribed herein, failing which consideration will be given to the entry of an affirmative intrastate order.

COMMISSIONER ARPAIA concurs in the result.

FREAS, *Commissioner*, concurring in part:

I cannot subscribe to that portion of this report which prescribes fares higher than those sought.

CHAIRMAN CROSS did not participate in the disposition of the proceeding.

APPENDIX

TABLE 1

Unrestricted Monthly Communation Fares Present, Proposed, and Prescribed

Between Chicago (Union Sta.), Ill., and	Distance	FARES Present	Proposed	Prescribed
Western Division	Miles			
Hermosa, Ill.	6.1	$ 7.20	$10.10	$15.00
Cragin, Ill.	7.2	8.40	11.80	15.00
Hanson Park, Ill.	7.9	9.60	13.45	15.00
Galewood, Ill.	8.8	10.20	14.30	15.00
Mars, Ill.	9.3	10.20	14.30	15.00
Mont Clare, Ill.	9.7	10.80	15.15	15.00
Elmwood Park, Ill.	10.4	10.80	15.15	15.00
River Grove, Ill.	11.6	11.80	16.55	15.00
Franklin Park, Ill.	13.4	12.30	17.25	15.40
Mannheim, Ill.	14.2	12.80	17.95	16.20
Bensenville, Ill.	17.4	14.30	20.05	18.20
Wooddale, Ill.	19.3	15.20	21.30	19.40
Itasca, Ill.	21.2	16.00	22.40	20.40
Medinah, Ill.	23.2	16.80	23.20	21.20
Roselle, Ill.	24.6	17.60	24.00	22.00
Ontarioville, Ill.	28.6	19.20	25.60	23.60
Bartlett, Ill.	30.3	19.60	26.00	24.00
Spaulding, Ill.	32.9	20.80	27.20	25.20
Elgin, Ill.	36.8	22.40	28.80	26.80
Northern Division				
Healy, Ill.	6.4	$ 7.20	$10.10	$15.00
Grayland, Ill.	8.2	9.60	13.45	15.00
Mayfair, Ill.	9.0	10.20	14.30	15.00
Forest Glen, Ill.	10.2	10.80	15.15	15.00
Edgebrook, Ill.	11.3	11.30	15.85	15.00
Morton Grove, Ill.	14.3	12.80	17.95	16.20
Golf, Ill.	16.2	13.80	19.35	17.60
Glenview, Ill.	17.4	14.30	20.05	18.20

Between Chicago (Union Sta.), Ill. and	Distance	FARES Present	Proposed	Prescribed
Northern Division	Miles			
Techny, Ill.	20.3	15.60	21.85	20.00
Northbrook, Ill.	20.9	16.00	22.40	20.40
Deerfield, Ill.	23.9	17.20	23.60	21.60
West Lake Forest, Ill.	28.0	18.80	25.20	23.20
Rondout, Ill.	32.3	20.40	26.80	24.80
Libertyville, Ill.	35.5	22.00	28.40	26.40
Grays Lake, Ill.	41.0	24.00	30.40	28.40
Round Lake, Ill.	44.0	25.20	31.60	29.60
Long Lake, Ill.	46.0	26.00	32.40	30.40
Wilson Road, Ill.	46.7	26.40	32.80	30.80
Ingleside, Ill.	47.8	26.80	33.20	31.20
Fox Lake, Ill.	49.5	27.60	34.00	32.00
Spring Grove, Ill.	53.7	29.20	35.60	33.60
Solon Mills, Ill.	55.8	30.00	36.40	34.40
Belden, Ill.	59.4	31.60	38.00	35.60
Hebron Siding, Ill.	61.8	32.40	38.80	36.80
Zenda, Wis.	67.4	34.40	40.80	38.80
Walworth, Wis.	73.5	37.20	43.60	41.60

Bases prescribed for other types of fares.

Subject to a minimum of 25 cents per trip in connection with all types of fares:

Between all points in the suburban area, one-way fares shall be based on 3 cents per mile, round-trip fares shall be 180 percent of the one-way fares, and 10-trip fares shall be 5 times the round-trip fares.

Between Chicago Union Station, on the one hand, and all other points in the suburban area, on the other, 25-trip fares shall be 11½ times the round-trip fares, and weekly and 46-trip commutation fares, respectively, shall be 25 and 90 percent of the unrestricted monthly fares, subject to maxima of 6 and 23 times the round-trip fares.

APPENDIX

TABLE II

Summary of Out-of-Pocket Cost Studies

1954

	Respondent	Protestant
Operating Revenues	$1,833,252	$1,865,055
Operating Expenses:[1]		
Maintenance of Way & Structures	93,913	22,210
Maintenance of Equipment	647,265	441,525
Traffic	3,573	3,573
Transportation	1,517,031	1,508,607
General	8,379	8,379
Total[2]	$2,270,161	1,984,294
Union Station	305,530	44,325
Credit for non-revenue passengers	17,928	173,265
Deficit or Income	$ 724,511[3]	$ 9,701[4]

[1] Including payroll taxes.
[2] Excluding Union Station.
[3] Deficit.
[4] Income.

APPENDIX D.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 21st day of November, A.D. 1955.

No. 31742

Chicago Intrastate Suburban Fares Of
Milwaukee Railroad

No. 11703

In The Matter Of Intrastate Rates Within
State Of Illinois

No. 26550

Passenger Fares And Surcharges

It appearing, That, by order dated March 4, 1955, the Commission instituted an investigation into the lawfulness of the interstate and intrastate fares within the Chicago suburban area of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, including the question of whether the outstanding orders in Nos. 11703 and 26550, as previously modified, should be further modified in certain respects;

And it further appearing, That such investigation has been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondent Chicago, Milwaukee, St. Paul and Pacific Railroad Company be, and it is hereby, authorized to establish, upon not less than 30 days' notice, interstate fares within said suburban area on the bases set forth as prescribed in said report.

It is further ordered, That the outstanding orders in Nos. 26550 and 11703, as subsequently modified, be, and they are hereby, further modified so as to permit the establishment and maintenance of interstate and intrastate fares within said suburban area on the bases so prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(Seal)

APPENDIX E.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 2nd day of March, A.D. 1956.

No. 31742

Chicago Intrastate Suburban Fares Of
Milwaukee Railroad
No. 11703

In The Matter Of Intrastate Rates Within
State Of Illinois
No. 26550

Passenger Fares And Surcharges

These proceedings having been duly heard and full investigation of the matters and things involved having been had, and this Commission having, on November 21, 1955, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and respondent and the Illinois Commerce Commission having been given a period of 60 days from the service of said report in which to adjust the intrastate fares in issue in this proceeding in accordance with the findings in said report:

And it appearing, That, on February 8, 1956, the Illinois Commerce Commission filed a petition for reconsideration of said report and for rehearing, that protestant Milwaukee Road Commuters' Association has filed a petition for reconsideration of said report, and that respondent has filed a reply to said petitions;

And it further appearing, That this Commission has given consideration to said petitions and reply, and has reached the conclusion that there has been presented no

showing of error of fact or law in said report, and that no sufficient grounds have been presented for the reconsideration and rehearing requested;

It is ordered, That the said petitions be, and they are hereby, denied;

It it further ordered, That respondent be, and it is hereby, notified and required to cease and desist on April 20, 1956, and thereafter to abstain, from practicing the undue, unreasonable, and unjust discrimination found to exist by Finding No. 2 of said report:

It is further ordered, That respondent be, and it is hereby, notified and required to establish on April 20, 1956, upon not less than 5 days' notice to this Commission and the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain for intrastate travel between points in respondent's Chicago suburban area within the State of Illinois fares no lower than the bases set forth in Finding No. 3 of said report;

And it is further ordered, That this order shall remain in effect until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY
Secretary

(Seal)

APPENDIX F.

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:

National Transportation Policy—

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 13(3)—

"Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regu-

lation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III."

Section 13(4)—

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter

to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a(2)—

"In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."